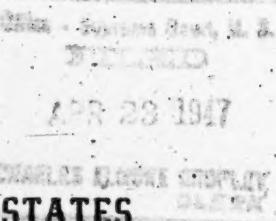


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 51

JOHN HARVEY HALEY,

*Petitioner,*

vs.

STATE OF OHIO,

*Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

**Statement of the Case**

Counsel for petitioner omitted in their statement of the case the fact that the petitioner was on the 23rd day of October, 1945, charged in the Juvenile Court of Stark County, Ohio, with being a delinquent boy.

Counsel for petitioner also omitted the fact that the Juvenile Court on the 14th day of November, 1945, in accordance with Section 1639-32 of the General Code of Ohio, accorded the petitioner a full and complete hearing as to his mental and physical condition; and that thereafter the Honorable Thomas H. Leahy, Judge of said Court,

relinquished jurisdiction in accordance with said statute and bound the petitioner over to the Common Pleas Court for disposition as an adult felon.

The petitioner's statement of the case definitely ends at the close of the first paragraph on page 2 of said Brief.

Counsel for petitioner, beginning with the second paragraph on page 2, interweaves argument with statement of the case. This argument as to facts we shall answer under the proper subdivision #2 of this Brief.

## II

### **ARGUMENT**

#### **Summary of the Argument**

##### **POINT A**

The facts in this case in no manner parallel facts as set forth in the nine outstanding cases involving the due process clause and decided by the United States Supreme Court since 1941.

The petitioner, together with Alfred Parks and Willie Lowder, ages 16 and 17 years respectively, entered into a common plan and design to commit robbery. The petitioner furnished the gun and was the lookout in the attempted robbery of William Karam on October 14, 1945.

Lowder and Parks entered Karam's store and killed him. After the shooting, the petitioner, with his co-participants, fled from the store and in an alley in the southeast section of the City of Canton, Ohio, formulated a story they would tell if picked up by police. The petitioner told the story, and then changed it (*see page 175 of the Record*), and later made a signed confession. *See pages 191 to 197 of the Record.*

The petitioner was arrested October 19, 1945, at about midnight and was taken to police headquarters. He was

questioned by detectives for about three or four hours. *See page 78 of the Record.*

After making an oral confession to police as shown by pages 69 and 88 of the Record, he signed a written confession which took the officers an hour and a half to write on the typewriter, the writing being completed at five o'clock in the morning. He made his written and oral confession not as a result of any mistreatment, but did so voluntarily after being shown the written statements of his co-participants in the crime. *See page 90 of the Record.*

His constitutional rights were read to him. *See page 92 of the Record.*

After his confession he was placed in the city jail, this being on a Friday. His mother went to the city jail on Monday, October 22, 1945. *See page 117 of the Record.*

He was taken to the county jail on Tuesday, October 23, 1945. *See page 122 of the Record.*

His mother, Susan Haley, on Tuesday, October 23, 1945, was by the county authorities denied admission to the jail because visiting day was not until Thursday. *See page 116 of the Record.*

On October 23, 1945, he was formally charged with being a delinquent boy. It can readily be seen that he was not held incommunicado and no place in the Record shows he was denied counsel. Only five hours elapsed between the time he was first arrested and the signed confession was made. Obviously no courts are open at that time of the night. The Juvenile Court at its early convenience conducted a complete hearing according to the Ohio statute and bound him over to the Common Pleas Court as an adult felon.

The only evidence in the Record of mistreatment is his own statement. He exhibited to the jury a pair of pants with the entire seat gone, and a blue shirt on which there was some claimed blood.

The evidence is undenied that immediately after he signed the written confession he took police officers to his home and showed them the trunk from which he got the gun. The jury evidently did not believe his story of the beating, because officers surely would not take him to his mother with his trousers practically torn off, and his shirt covered with blood. On the contrary, the evidence showed that Haley was not wearing a blue shirt the morning he made his confession but was wearing a white one and exhibited no evidence of having been beaten. *See pages 211 and 215 of the Record.*

Counsel for the petitioner on page 3 of their Brief, say that page 113 of the Record discloses that a police officer on the witness stand said, "A stopper was put on him." We submit that page 113 of the Record, nor any other page discloses such testimony.

On page 4 of the Brief of counsel for the petitioner, the claim is made that the only evidence the State had was the confession. This is not a correct statement of the Record. The State could have convicted the petitioner without the confession because of the bullet that was taken from Karam's body, and an empty cartridge that was found at the scene of the crime. *See page 51 of the Record.*

There was only one gun used in this crime and that was a 32 automatic pistol which Haley furnished. The State connected Haley with the death weapon by the testimony of Robert F. Zimmer, F. B. I. firearms examiner. Zimmer testified that the cartridge found in the store and the bullet that was taken from Karam's body were fired from the pistol that Haley took from his father's trunk and gave to his co-participants in the crime. *See pages 255, 256 and 261 of the Record.*

It was anticipated by the State of Ohio, that the petitioner would make the claim that he was a poor little colored boy that had been badly beaten by police officers and that his

confession was not voluntary. For that reason the State of Ohio made its case to the satisfaction of the courts and jury on the expert testimony as to the gun, cartridge and bullet.

#### POINT B

The Ohio rule determining the admissibility of confessions does not work a deprivation of the due process clause of the Constitution of the United States.

It is contended that the confession was inadmissible because obtained before a charge.

The matter of the admissibility and use of confessions in relation to the due process provisions of the Federal Constitution has been considered by the United States Supreme Court in no less than nine outstanding cases since 1941. These cases arise under provisions in the criminal codes of the various states and the Federal Government requiring in effect that upon arrest an accused shall be taken before a magistrate. Failure to abide by this rule becomes a basis therefore of invoking the Fifth and Fourteenth Amendments of the Federal Constitution relating to deprivation of liberty without due process of law.

At the outset it should be noted that the Fifth Amendment by a long line of decisions in both the state and federal courts, is held not to apply to state proceedings and consequently need not be considered in other than federal cases. The Fourteenth Amendment, however, is binding upon federal and state governments alike. This distinction has not been broadened by the recent pronouncements of the Supreme Court relative to the admissibility and use of confessions obtained before a charge.

The Supreme Court of the United States has not at any point overruled its findings in the case of *Lisenba v. California*, 314 U. S., 219. The facts here were briefly:

Defendant and Hope, it was alleged, entered into a conspiracy to kill defendant's wife. The arrest was made April 19 on a charge of incest on which charge defendant was booked. On April 21 he was given a hearing and remanded to jail. On May 2 and 3 he made various statements implicating himself in his wife's death. Hope confessed and pleaded guilty. On trial claim was made that neither defendant's statements nor Hope's confession were voluntary. A hearing was held by the court which ruled statements and confession admissible. Defendant claimed he had been denied access to counsel in that he had been held *incommunicado* and that the confession of Hope had been obtained by promise of leniency.

Under the circumstances the court held, with Black and Douglas dissenting:

"The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce such rule for determining admissibility of confession as she elects, whether or not it conforms to that applied in federal courts or in other state courts, but the adoption of the rule of her choice cannot foreclose inquiry regarding whether, in a given case, the application of that rule works a deprivation of prisoner's life or liberty without due process of law."

"Where the evidence regarding the methods employed to obtain a confession is conflicting, and where, although denial of due process was not in issue in the trial, an issue has been resolved by court and jury which involves an answer to the due process question, *the United States Supreme Court in determining issue of denial of due process of law accepts the determination of the trier of the facts unless it is so lacking in support in evidence that to give it effect would work that fundamental unfairness which is at war with due process.*"

"Where California trial judge and jury passed on question, in murder prosecution, whether accused's confessions were freely and voluntarily made, and

the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of 'due process of law' notwithstanding the issue submitted and was not by name one concerning due process, the United States Supreme Court could not on the record determine that the illegal conduct in which law enforcement officers of California indulged by prolonged questioning of the accused before arraignment and in absence of counsel, or their further questioning after an interval of 11 days, coerced the confessions, and therefore introduction thereof did not constitute an infringement of 'due process of law'."

Consideration of the recent Supreme Court cases on this question by arranging them in chronological order is helpful in observing the trend of the Court's thinking but will also show considerable broadening of the Court's view of this subject and the great variance in the thinking of the individual justices.

The case of *Chambers v. Florida*, 309 U. S. 227, was decided February 1940, by a unanimous court (opinion by Justice Black). The preliminary history of this case is interesting. The original conviction was affirmed by the Supreme Court of Florida. After this a latter petition for rehearing was granted and a retrial ordered. The conviction upon retrial was again reversed by the state Supreme Court and remanded. The conviction on the second retrial was again reversed by the Supreme Court and remanded with a change of venue. The conviction on the third retrial was finally affirmed by the Supreme Court of the state, but reversed in the Supreme Court of the United States.

The basic facts were as follows:

A white man was murdered about 9:00 p. m., May 13, 1933. By 10:00 o'clock one of the defendants, a Negro, had been

arrested and within the next twenty-four hours some forty more Negroes were arrested, including the other defendant. All arrests were without warrants and the prisoners were confined in the jail. Two nights later Chambers was removed to Miami, after being reminded of the possibility of mob violence. The next day he was returned to the scene of the crime and from May 14 until May 20 all suspects were subjected individually to extensive questioning. From the afternoon of May 20 until sunrise of the twenty-first, Chambers underwent persistent and repeated questioning. At no time were prisoners permitted counsel. There was conflict as to whether or not any actual physical mistreatment occurred. From 1:30 p. m. Saturday (twentieth) until sunrise Sunday (twenty-first) there was a continual battery of questions until defendants confessed. Two days later they were committed.

The principal holding of the Supreme Court was in brief:

“The requirements of conforming to fundamental standards of procedure in criminal trials was made operative against the states by the Fourteenth Amendment.”

“Where the record showed that the confessions were obtained by means prescribed by the due process clause of the Fourteenth Amendment convictions obtained by use of the confessions could not be sustained.”

The next case, that of *White v. Texas*, 310 U. S. 530, was also decided by a unanimous court (Justice Black) and fully affirmed the foregoing case. In this case, defendant was an illiterate farmhand who was arrested without warrant a day after the crime along with fifteen or sixteen Negroes in the vicinity. Defendant was taken to the county jail where he was kept six or seven days. Defendant alleged that on several successive nights he was taken from the jail out into the woods by armed Texas Rangers who whipped

him each time and asked him for a confession. Defendant finally signed a confession after five hours of continual questioning at the time of the detention period. Charges were not filed until after the confession was signed.

Again the court held the evidence clearly showed coercion and the

"confession was obtained and used in such manner that defendant's trial fell short of the procedural due process guaranty by the constitution;"

In May 1941, a similar case, *Lomax v. Texas*, 513 U. S., 554, was reversed without opinion under authority of the *Chambers* and *White* cases above.

Since the foregoing cases were decided the court has failed to render a unanimous opinion in any later case.

The case of *McNabb v. U. S.*, 216 U. S., 332, was decided March 1, 1943, with Justice Reed dissenting and Justice Frankfurter writing the opinion of the majority. The case involved the murder of a Federal officer and was tried in the Federal court. Principal facts:

On July 31 information was received that McNabb was making untaxed whiskey. Four revenue agents and others that night found the McNabb still and McNabb's five brothers fled. An officer pursued and was shortly afterwards found dead. Three or four hours later the McNabbs were arrested. They were detained in Chattanooga for fourteen hours and that evening defendants were questioned singly and jointly for about five hours. Questioning was resumed the next morning and that afternoon they confessed. Questioning continued on discrepancies in the various stories until two o'clock Saturday morning, that is, two days after arrest. There was no arraignment as required by Federal law until after the confessions.

The Supreme Court again reiterated that its power over state convictions was limited to the enforcement of the due

*process clause of the Fourteenth Amendment but its reviewing power over convictions in Federal courts was "not confined to ascertainment of constitutional validity."* It held a confession secured by unlawful restraint and questioning was inadmissible and a conviction based upon it should be set aside. The court observed that the mere fact that a confession is made while the accused is in custody does not render it inadmissible but where it appeared that evidence had been obtained in violation of legal rights the trial court should on motion conduct a hearing on the admissibility of the evidence.

The Federal statutory requirements and those of the state compare closely, 18 U.S.C.A., 595 providing:

"It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial . . . ."

and further, U.S.C.A., 593:

"The person arrested shall be immediately taken before a committing officer."

Similarly, it is provided in G.C. 13432-3:

"When a peace officer has arrested a person without a warrant, he must without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, . . . ."

and in G.C. 13432-4:

"A private person who has made an arrest must, without unnecessary delay, take the person arrested before the most convenient court or magistrate."

and in G.C. 13432-19:

"A warrant shall . . . command the officer to whom issued, forthwith, to take the accused and bring him

before the magistrate or court issuing such warrant, or other magistrate of the county having cognizance of the case, \* \* \*."

The court said that "while Congress has not explicitly forbidden the use of evidence so procured, a court should entertain a motion to exclude the evidence." It will be noticed that nowhere in the *McNabb* case does the court attempt to set out the standards or the rules upon which such a motion should be decided. Had it done so it would be possible to give a reasonable application of such standards both in the state and Federal courts. But the situation was left with the Supreme Court undertaking to decide in each specific instance whether the confession obtained by means technically illegal is voluntary or not. This seems to prevent a trial court from taking any assured and safe disposition of the motion to exclude a confession, and is pointed out very clearly by Justice Reed in his dissenting opinion as follows:

"Were the court today saying merely that in its judgment the confessions of the *McNabb* were not voluntary there would be no occasion for this single protest. A notation of dissent would suffice. The opinion, however, does more. Involuntary confessions are not constitutionally inadmissible because violative of the provision of self-incrimination in the Bill of Rights. Now the court leaves undecided whether the present confessions are voluntary or involuntary and declares that the confessions must be excluded because in addition to questioning the petitioners, the arresting officers failed promptly to take them before a committing magistrate. The court finds a basis for the declaration of this new rule of evidence in its supervisory authority over the administration of criminal justice. I question whether this offers to the trial courts and the peace officers a rule of admissibility as clear as the test of the voluntary character of the confession. \* \* \* if these confessions are otherwise voluntary, civilized stand-

ards, in my opinion, are not advanced by setting aside these judgments because of acts of omission which are not shown to have tended toward coercing the admissions."

The case of *Anderson v. U. S.*, 318 U. S. 350, was decided the same day as the *McNabb* case.

Here also was a Federal case but it involved both Federal and State police officers. On April 24 the local sheriff made many arrests including the eight defendants in the case without warrants. The men were not committed. Questioning continued intermittently after which confessions were made by six of the defendants. After confessions, actual arrests were made by Federal police and the prisoners were thereupon immediately arraigned, the confessions being urged by the government in the ultimate trial of the case.

Again a Federal question was involved. Justice Frankfurter again delivered the opinion of the Court and Justice Reed again dissented. This case involved the further point of whether confessions obtained from one defendant in violation of the Federal statute could be used against others. The Court, however, followed the *McNabb* case and stated:

"Since it was error to admit (these confessions,) we see no escape from the conclusion that the convictions of all the petitioners must be set aside."

A year later the Court had occasion to consider the case of *U. S. v. Mitchell*, 322 U. S. 65, which arose in the District of Columbia.

Defendant was taken into custody at 7:00 o'clock October 12 and was taken to the police station. He readily admitted his guilt and directed the police in their search for various items of stolen property. The commitment occurred eight days later. The appellate court reversed a conviction on

authority of the *McNabb* case, holding that the illegal detention rendered the confession inadmissible.

The opinion was written by Justice Frankfurter, with Douglas, Rutledge and Reed concurring in the result although not the reasoning and with Black dissenting. In this case, the statements against interest preceded the illegal detention and thus the Court was enabled to avoid the application of its previous doctrine in the *McNabb* case, stating that:

"their admission, therefore would not be used by the government of the fruits of the wrongdoing of its officers. Being irrelevant, they could be excluded only as punitive measure against unrelated wrong doing by the police."

The Court apparently, therefore, hinges its decision upon the purpose of the illegal detention.

In attempting to formulate a workable rule Reed states in a supplementary opinion:

"As I understand *McNabb v. United States*, as explained by the court's opinion today, the rule is that where there has been illegal detention of a prisoner, joined with other circumstances which are deemed by his court to be contrary to proper conduct of federal prosecutions, the confession will not be admitted. Further, this refusal of admission is required even though the detention plus the conduct does not together amount to duress or coercion. \* \* \* In my view detention without commitment is only one factor for consideration in reaching a conclusion as to whether or not a confession is voluntary. \* \* \* If the confession is voluntary it is admissible."

A week subsequent to the *Mitchell* case the Court decided the case of *Ashcraft v. Tennessee*, 322 U. S. 143. This was a State case. Defendant was taken into custody on June 14 and questioned in relays until the morning of June 16, dur-

ing most of which period he had no rest. Defendant's statements during the course of the questioning implicated an individual named Ware who confessed. Arraignment was not had until after both confessions were signed and completed.

For the first time, as to State courts, an attempt was made to formulate a standard of admissibility for confessions obtained during detention, to-wit: its own "independent examination of the defendant's claims, which duty could not have been foreclosed by finding of the court, or verdict of jury, or both." The Court split six to three on the issue with Black writing the opinion of the Court and with Jackson, Roberts and Frankfurter dissenting, but the Court itself did not seem to apply its own rule in this opinion where it is stated:

"Our conclusion is that if *Ashcraft* made a confession it was not voluntary but compelled. We reach this conclusion from facts which are *not in dispute at all*."

The minority opinion in the *Ashcraft* case is in serious and complete disagreement with the majority opinion. Justice Jackson states:

"A sovereign state is now before us summoned on the charge that it has obtained convictions by methods so unfair that a federal court must set aside what the state courts have done. Heretofore the state has had the benefit of presumption of regularity and legality. A confession made by one in custody heretofore has been admissible in evidence unless it was provided and found that it was obtained by pressures so strong that it was in fact involuntarily made, that the individual will of the particular confessor had been overcome by torture, mob violence, fraud, trickery, threats, or promises. Even where there was excess and abuse of power on the part of officers, the state still was entitled to use the confession if upon examination of the whole evidence it was found to negative the view of the ac-

eused had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer."

it is then pointed out that the *Ashcraft* decision determines:

- (1) A presumption that the confession is involuntary because examination in custody is inherently coercive;
- (2) It makes that presumption irrebuttable because it refuses to resolve conflicts in evidence to determine whether other proof is sufficient to overcome the presumption; and
- (3) It sets aside factual findings of the state court to the effect that the confession was voluntary giving to such findings no weight and regarding them as immaterial.

Justice Jackson further points out:

"This *court* never yet has held that the Constitution denies a state the right to use a confession just because the confessor was questioned in custody where it did not also find other circumstances that deprived him of a free choice to admit or deny or to refuse to answer."

The opinion of the minority insofar as it is concerned with the due process guaranty of the constitution would seem to be infinitely better reasoning in that it would permit the state to apply its own conception of due process as it did in the *Ashcraft* case and would confine the Supreme Court of the United States to the inquiry of whether or not the due process of the state had been violated in the state court, and whether or not the conviction was unsupported by other and sufficient evidence.

The most recent pronouncement of the Supreme Court of the question under consideration is that of *Malinski v. New York*, 324 U. S., 401, decided March 26, 1945. This case involved two petitioners, *Malinski* and *Rudish*, wherein a

confession by Malinski implicated himself and Rudish. In the use of the Malinski confession upon trial Rudish was referred to by letter X. Malinski, Rudish and Indovlono were arrested October 23, 1942, at 8:00 a. m. Malinski was taken to a hotel, stripped and kept naked until about 11:00 a. m. at which time he was allowed shoes, socks, underwear and a blanket. He remained that way until about 6:00 p. m. There was conflict as to whether he was beaten during this period. He was visited by a friend from Sing Sing Friday afternoon and after a private conference with the convict he confessed, after which he was allowed to put on the balance of his clothes, but was held at the hotel for an additional three days during which time there were various periods of questioning and several trips to identify elements of evidence in the case.

On October 27 about 2:00 a. m. he made an additional confession at the police station whereupon he was booked and arraigned. Only the second confession, of October 27, was introduced at the trial.

Rudish was tried jointly with Malinski—his counsel not asking for a severance. Malinski's confession of October 27 implicated Rudish. In the confession upon trial Rudish was referred to by letter X under instructions from the court.

In affirming the judgment as to Rudish, the court observed that the questions raised in respect to him involved matters of state procedure beyond our province to review and that the case against him was not dependent upon Malinski's confession of October 27.

Again the court was in marked disagreement,—the judgment against Rudish being affirmed and that against Malinski being reversed and remanded. Justice Frankfurter was of the opinion that the judgment as to Rudish should also be remanded. Justice Rutledge was of the

opinion that the judgment against Rudish should be reversed and Justice Murphy concurred with Justice Rutledge. Justices Stone, Roberts, Reed and Jackson were in accord in holding that the judgment should be affirmed as to both of the accused. *Since the Malinski case is a state case and since it is the latest expression on a confusing line of decisions, it would seem desirable to use that case as a summary of the principles now recognized by the Supreme Court on the question of confessions and due process.*

The court states, in regard to a co-defendant who is implicated in an involuntary confession, that where:

"the conviction of the particular defendant did not rely on the confession there was no substantial federal question to review even if the confession was involuntary."

and further, where the confession was involuntary, as a matter of fact to be deduced from an examination of the record, the

"conviction in a state court would be set aside as a denial of due process of law,"

the question for the court's determination being:

"Whether the defendant was deprived of the due process of law by which he was constitutionally entitled to have his guilt determined."

The view previously expressed in the *Ashcraft* case as to the function of the Supreme Court on this question is reiterated in the following words:

"Judicial review of the guaranty of due process imposes an exercise of judgment upon the whole course of the proceedings to ascertain whether they offend these canons of decency and fairness which express the notions of justice of English-speaking peoples . . . . ."

The court further recognizes that some weight is to be given to a previous determination of due process by the state courts in the following words:

"An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review but there cannot be blind acceptance even of such weighty judgment."

And the court closes by again confirming the established doctrine that its review is limited to a consideration of the Fourteenth Amendment when it states that:

"The Federal Supreme Court must subject the convictions from state courts to the very narrow scrutiny which the due process clause of the Fourteenth Amendment authorizes."

If the situation as resolved in the *Malinski* case can be logically and briefly summarized, it might be done as follows:

- (1) That a conviction will not be set aside even if an involuntary confession is coupled with a denial of due process when it can be sustained without the use of the coercive confession;
- (2) The court reserves the right to make its own independent determination of whether or not there has been a denial of due process under the Fourteenth Amendment in any case where a conviction is based solely upon such a denial;
- (3) The judgment of the state court on this question will be given due deference but not *prima facie* acceptance; and
- (4) The power of review of the Supreme Court in a state case arises solely by virtue of the Fourteenth Amendment.

If these principles be accepted as the present view of the court majority, the minority of four still dissents strongly as to the proper function of the court. Justice Stone states in the dissenting opinion in the *Malinski* case:

"It is not the function of the court, in reviewing on constitutional grounds criminal convictions by state courts, to weigh the evidence or to sit as a super-jury. We have set aside state convictions where the case was improperly submitted to the jury, or where the unchallenged evidence plainly showed a violation of due process, but we have not hitherto overturned the verdict of a state court jury by weighing the conflicting evidence on which it was based."

Subsequent to the decision of the United States Supreme Court in the *Ashcraft* case, but prior to its decision of the *Malinski* case, Judge Hornbeck writing for the Court of Appeals for Fayette county, Ohio, decided the case of *State v. Collet*, 58 N. E. (2d) 417, in which the issues raised by the decisions of the Supreme Court up to that time were considered. The facts were briefly:

Defendant was arrested on November 30 without a warrant and placed in the county jail. He was requested on that day to submit to a "lie detector test." Early the next morning about 2:00 a. m. he was driven to Toledo where he took the test. He was questioned intermittently through the day and confessed about 5:30 p. m. on Friday evening. Defendant was formally charged before a justice of the peace on December 4.

On the factual proposition as to whether or not the confession involved was voluntary, the court found some conflict in the evidence. The trial judge conducted a hearing without the jury and with full testimony on the question of the admissibility of the confession. As a result of such hearing it was determined that the confession was admissi-

ble. The court then proceeded to discuss the Ohio law only and found it to be that:

"The confession must be held to be voluntary under the evidence in the light of the verdict and the judgment returned."

the test to be applied being:

(1) Where violence, threats or promises used or made, and

(2) The effect of such acts upon the free will of the defendant.

The court concluded on this point that if notwithstanding violence, threats or promises:

"It fairly appears that he voluntarily admitted the commission of a crime, such confession is admissible against him."

The court then proceeds to consider the effect, if any, of the *McNabb*, *Anderson*, *Mitchell* and *Ashcraft* cases upon this rule. The court notes the distinguishing feature of *McNabb*, *Anderson* and *Mitchell* cases as being federal cases and subject to federal rules of evidence.

The court, however, observes that in the *Mitchell* case, where a decision based on the *McNabb* case was reversed, that:

"The mere fact that a confession was made while in custody of the police does not render it inadmissible."

Judge Hornbeck accordingly finds this as the essential question to be determined:

"What effect, as a matter of fact, did the delay in the arraignment of the prisoner have in bringing about the confession."

The judge further stated in regard to the *Ashcraft* case:

"That the facts do not so closely parallel those in this case as to require us to say, as a matter of law, that the confessions here were secured in violation of the Fourteenth Amendment."

It is then pointed out that the *Ashcraft* case did not overrule *Lisenba v. California* where the Supreme Court of the United States held that the Fourteenth Amendment permits the state to adopt a rule for determining the admissibility of confessions provided the rule does not foreclose an inquiry as to whether its application works a deprivation of due process.

In the case at bar the mere fact that this confession was made while in custody of the police does not render it inadmissible. Taking the hour most unfavorable to the state's case, it can safely be said that by seven o'clock in the morning Haley's confession was completed. At that time it was either a voluntary confession or an involuntary one, and it was either good or bad as of that hour. There is nothing in this record to support any theory or claim that Haley was denied counsel before the confession was signed, sealed and delivered in that particular early morning hour. The sole question then remaining was whether or not the confession was obtained by force or violence, coercion or putting in fear.

Upon the question of force or violence the trial court measured the evidence by the Ohio rule and standard, and measured by that standard determined with the aid and help and the finding of a jury, that this confession was admissible; that it was not obtained by force or violence, coercion or the putting in fear.

Nowhere in all of the cases of the Supreme Court of the United States bearing upon this question has this Court ever overruled a doctrine of *Lisenba v. California*, wherein

this court held that the Fourteenth Amendment permits the State to adopt a rule for determining the admissibility of confessions, providing the rule does not foreclose an inquiry as to whether its application works a deprivation of due process.

We are satisfied that this Court, from an examination of the record and the authorities cited, will determine and can come to no other conclusion than that the Ohio rule for determining the admissibility of confessions is a fair one, and that that rule was fully and completely complied with and that that rule does not foreclose an inquiry as to whether its application works a deprivation of due process, and that that inquiry having now been made by this Court there was in this particular case no deprivation of due process, and the verdict of the trial jury should be sustained.

Respectfully submitted,

D. DEANE McLAUGHLIN,  
*Prosecuting Attorney;*  
W. BERNARD RODGERS,  
*Assistant Prosecuting Attorney;*  
JOHN ROSETTI,  
*Assistant Prosecuting Attorney,*  
*Counsel for Respondent.*

(3499)

Frankfurter } pp. 2, 5, 6.

# SUPREME COURT OF THE UNITED STATES

No. 51.—OCTOBER TERM, 1947.

John Harvey Haley, Petitioner, | On Writ of Certiorari to  
v. | the Supreme Court of  
The State of Ohio. | the State of Ohio.

[January 12, 1948.]

MR. JUSTICE DOUGLAS announced the judgment of the Court and an opinion in which MR. JUSTICE BLACK; MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE join.

Petitioner was convicted in an Ohio court of murder in the first degree and sentenced to life imprisonment. The Court of Appeals of Ohio sustained the judgment of conviction over the objection that the admission of petitioner's confession at the trial violated the Fourteenth Amendment of the Constitution. 79 Ohio App. 237. The Ohio Supreme Court, being of the view that no debatable constitutional question was presented, dismissed the appeal. 147 Ohio St. 340. The case is here on a petition for a writ of certiorari which we granted because we had doubts whether the ruling of the court below could be squared with *Chambers v. Florida*, 309 U. S. 227, *Malinski v. New York*, 324 U. S. 401, and like cases in this Court.

A confectionery store was robbed near midnight on October 14, 1945, and William Karam, its owner, was shot. It was the prosecutor's theory, supported by some evidence which it is unnecessary for us to relate, that petitioner, a Negro boy age 15, and two others, Willie Lowder, age 16, and Al Parks, age 17, committed the crime, petitioner acting as a lookout. Five days later—around midnight October 19, 1945—petitioner was arrested at his home and taken to police headquarters.

There is some contrariety in the testimony as to what then transpired. There is evidence that he was beaten. He took the stand and so testified. His mother testified

that the clothes he wore when arrested, which were exchanged two days later for clean ones she brought to the jail, were torn and blood-stained. She also testified that when she first saw him five days after his arrest he was bruised and skinned. The police testified to the contrary on this entire line of testimony. So we put to one side the controverted evidence. Taking only the undisputed testimony (*Malinski v. New York, supra*, p. 404 and cases cited), we have the following sequence of events. Beginning shortly after midnight this 15-year old lad was questioned by the police for about five hours. Five or six of the police questioned him in relays of one or two each. During this time no friend or counsel of the boy was present. Around 5 a. m.—after being shown alleged confessions of Lowden and Parks—the boy confessed: A confession was typed in question and answer form by the police. At no time was this boy advised of his right to counsel; but the written confession started off with the following statement:

"we want to inform you of your constitutional rights, the law gives you the right to make this statement or not as you see fit. It is made with the understanding that it may be used at a trial in court either for or against you or anyone else involved in this crime with you, of your own free will and accord, you are under no force or duress or compulsion and no promises are being made to you at this time whatsoever.

"Do you still desire to make this statement and tell the truth after having had the above clause read to you?"

"A. Yes."

He was put in jail about 6 or 6:30 a. m. on Saturday, the 20th, shortly after the confession was signed. Between then and Tuesday, the 23d, he was held incommunicado. A lawyer retained by his mother tried to see

him twice but was refused admission by the police. His mother was not allowed to see him until Thursday, the 25th. But a newspaper photographer was allowed to see him and take his picture in the early morning hours of the 20th, right after he had confessed. He was not taken before a magistrate and formally charged with a crime until the 23d—three days after the confession was signed.

The trial court, after a preliminary hearing on the voluntary character of the confession, allowed it to be admitted in evidence over petitioner's objection that it violated his rights under the Fourteenth Amendment. The court instructed the jury to disregard the confession if it found that he did not make the confession voluntarily and of his free will.

But the ruling of the trial court and the finding of the jury on the voluntary character of the confession do not foreclose the independent examination which it is our duty to make here. *Ashcraft v. Tennessee*, 322 U. S. 143, 147-148. If the undisputed evidence suggests that force or coercion was used to exact the confession, we will not permit the judgment of conviction to stand even though without the confession there might have been sufficient evidence for submission to the jury. *Malinski v. New York*, *supra*, p. 404, and cases cited.

We do not think the methods used in obtaining this confession can be squared with that due process of law which the Fourteenth Amendment commands.

What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his

early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a. m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him. No friend stood at the side of this 15-year old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. A photographer was admitted once this lad broke and confessed. But not even a gesture towards getting a lawyer for him was ever made.

This disregard of the standards of decency is underlined by the fact that he was kept incommunicado for over three days during which the lawyer retained to represent him twice tried to see him and twice was refused admission. A photographer was admitted at once; but his closest friend—his mother—was not allowed to see him for over five days after his arrest. It is said that these events are not germane to the present problem because they happened after the confession was made. But they show such a callous attitude of the police towards the safeguards which respect for ordinary standards of human relationships compels that we take with a grain of salt their present apologia that the five-hour grilling of this boy was conducted in a fair and dispassionate manner. When the police are so unmindful of

these basic standards of conduct in their public dealings, their secret treatment of a 15-year old boy behind closed doors in the dead of night becomes darkly suspicious.

The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.

But we are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions. Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain.

The course we followed in *Chambers v. Florida, supra*, *White v. Texas*, 310 U. S. 530, *Ashcraft v. Tennessee, supra*, and *Malinski v. New York, supra*, must be followed here. The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them.

*Reversed.*

# SUPREME COURT OF THE UNITED STATES.

No. 51.—OCTOBER TERM, 1947.

John Harvey Haley, Petitioner, On Writ of Certiorari to  
v. the Supreme Court of  
The State of Ohio. the State of Ohio.

[January 12, 1948.]

MR. JUSTICE FRANKFURTER, joining in reversal of judgment.

In a recent series of cases, beginning with *Brown v. Mississippi*, 297 U. S. 278, the Court has set aside convictions coming here from State courts because they were based on confessions admitted under circumstances that offended the requirements of the "due process" exacted from the States by the Fourteenth Amendment. If the rationale of those cases ruled this, we would dispose of it *per curiam* with the mere citation of the cases. They do not rule it. Since at best this Court's reversal of a State court's conviction for want of due process always involves a delicate exercise of power and since there is a sharp division as to the propriety of its exercise in this case, I deem it appropriate to state as explicitly as possible why, although I have doubts and difficulties, I cannot support affirmance of the conviction.

The doubts and difficulties derive from the very nature of the problem before us. They arise frequently when this Court is obliged to give definiteness to "the vague contours" of Due Process or, to change the figure, to spin judgment upon State action out of that gossamer concept. Subtle and even elusive as its criteria are, we cannot escape that duty of ~~judicial~~ review. The nature of the duty, however, makes it especially important to be humble in exercising it. Humility in this context means an alert self-scrutiny so as to avoid infusing into the vagueness of a Constitutional command one's merely private notions.

Like other mortals, judges, though unaware, may be in the grip of prepossessions. The only way to relax such a grip, the only way to avoid finding in the Constitution the personal bias one has placed in it, is to explore the influences that have shaped one's unanalyzed views in order to lay bare prepossessions.

A lifetime's preoccupation with criminal justice, as prosecutor, defender of civil liberties and scientific student, naturally leaves one with views. Thus, I disbelieve in capital punishment. But as a judge I could not impose the views of the very few States who through bitter experience have abolished capital punishment upon all the other States, by finding that "due process" proscribes it. Again, I do not believe that even capital offenses by boys of fifteen should be dealt with according to the conventional criminal procedure. It would, however, be bald judicial usurpation to hold that States violate the Constitution in subjecting minors like Haley to such a procedure. If a State, consistently with the Fourteenth Amendment, may try a boy of fifteen charged with murder by the ordinary criminal procedure, I cannot say that such a youth is never capable of that free choice of action which, in the eyes of the law, makes a confession "voluntary."

Again, it would hardly be a justifiable exercise of judicial power to dispose of this case by finding in the Due Process Clause constitutional outlawry of the admissibility of all private statements made by an accused to a police officer however much legislation to that effect might seem to me wise. See The Indian Evidence Act of 1872, § 25; cf. § 26.

to detach themselves from their merely private views. (It is noteworthy that while American experience has been drawn upon in the framing of constitutions for

other democratic countries, the Due Process Clause has not been copied. See, also, the illuminating debate on the proposal to amend the Irish Home Rule Bill by incorporating our Due Process Clause. 42 H. C. Deb. 2082-2091, 2215-2267 (5th ser. 1912.).

While the issue thus formulated appears vague and impenetrable, it cannot be too often repeated that the limitations which the Due Process Clause of the Fourteenth Amendment placed upon the methods by which the States may prosecute for crime cannot be more narrowly conceived. This Court must give the freest possible scope to States in the choice of their methods of criminal procedure. But these procedures cannot include methods that may fairly be deemed to be in conflict with deeply rooted feelings of the community. See concurring opinions in *Malinski v. New York*, 324 U. S. 401, 412, and *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 466. Of course this is a most difficult test to apply, but apply it we must, warily, and from case to case.

This brings me to the precise issue on the record before us. Suspecting a fifteen-year-old boy of complicity in murder resulting from attempted robbery, at about midnight the police took him from his home to police headquarters. There he was questioned for about five hours by at least five police officers who interrogated in relays of two or more. About five o'clock in the morning this procedure culminated in what the police regarded as a confession, whereupon it was formally reduced to writing. During the course of the interrogation the boy was not advised that he was not obliged to talk, that it was his right if he chose to say not a word, nor that he was entitled to have the benefit of counsel or the help of his family. Bearing upon the safeguards of these rights, the Chief of Police admitted that while he knew that the boy "had a right to remain mute and not answer any questions" he did not know that it was the duty of the police to apprise

him of that fact. Unquestionably, during this whole period he was held incommunicado. Only after the night-long questioning had resulted in disclosures satisfactory to the police and as such to be documented, was there read to the boy a clause giving the conventional formula about his constitutional right to make or withhold a statement and stating that if he makes it, he makes it of his "own free will." Do these uncontested facts justify a State court in finding that the boy's confession was "voluntary," or do the circumstances by their very nature preclude a finding that a deliberate and responsible choice was exercised by the boy in the confession that came at the end of five hours questioning?

The answer, as has already been intimated, depends on an evaluation of psychological factors, or, more accurately stated, upon the pervasive feeling of society regarding such psychological factors. Unfortunately, we cannot draw upon any formulated expression of the existence of such feeling. Nor are there available experts on such matters to guide the judicial judgment. Our Constitutional system makes it the Court's duty to interpret those feelings of society to which the Due Process Clause gives legal protection. Because of their inherent vagueness the tests by which we are to be guided are most unsatisfactory, but such as they are we must apply them.

The Ohio courts have in effect denied that the very nature of the circumstances of the boy's confession precludes a finding that it was voluntary. Their denial carries great weight, of course. It requires much to be overcome. But it does not end the matter. Against it we have the judgment that comes from judicial experience with the conduct of criminal trials as they pass in review before this Court. An impressive series of cases in this and other courts admonishes of the temptations to abuse of police endeavors to secure confessions from suspects, through protracted questioning, carried on in secrecy, with

the inevitable disquietude and fears police interrogations naturally engender in individuals questioned while held incommunicado, without the aid of counsel and unprotected by the safeguards of a judicial inquiry. Disinterested zeal for the public good does not assure either wisdom or right in the methods it pursues. A report of President Hoover's National Commission on Law Observance and Enforcement gave proof of the fact, unfortunately, that these potentialities of abuse were not the imaginings of mawkish sentimentality, nor their tolerance desirable or necessary for a stern policy against crime. Legislation throughout the country reflects a similar belief that detention for purposes of eliciting confessions through secret, persistent, long-continued interrogation violates sentiments deeply embedded in the feelings of our people. See *McNabb v. United States*, 318 U. S. 332, 342-43.

It is suggested that Haley's guilt could easily have been established without the confession elicited by the sweating process of the night's secret interrogation. But this only affords one more proof that in guarding against misuse of the law enforcement process the effective detection of crime and the prosecution of criminals are furthered and not hampered. Such constitutional restraints of decency derive from reliance upon the resources of intelligence in dealing with crime and discourage the too easy temptations of unimaginative crude force, even when such force is not brutally employed. (It is significant to note that since 1872 no confession made by an accused to a police officer has been admissible against him in Indian criminal proceedings. See The Indian Evidence Act of 1872, § 25, cf. § 26.)

It would disregard standards that we cherish as part of our faith in the strength and well-being of a rational, civilized society to hold that a confession is "voluntary" simply because the confession is the product of a sentient

choice. "Conduct under duress involves a choice." *Union Pacific R. Co. v. Public Service Commission*, 248 U. S. 67, 70, and conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint.

Unhappily we have neither physical nor intellectual weights and measures by which judicial judgment can determine when pressures in securing a confession reach the coercive intensity that calls for the exclusion of a statement so secured. Of course, the police meant to exercise pressures upon Haley to make him talk. That was the very purpose of their procedure. In concluding that the pressures that were exerted in this case to make a lad of fifteen talk when the Constitution gives him the right to keep silent, and when the situation was so contrived that appreciation of his rights and thereby the means of asserting them were effectively withheld from him by the police, I do not believe I express a merely personal bias against such a procedure. Such a finding, I believe, reflects those fundamental notions of fairness and justice in the determination of guilt or innocence which lie embedded in the feelings of the American people and are enshrined in the Due Process Clause of the Fourteenth Amendment. To remove the inducement to resort to such methods this Court has repeatedly denied use of the fruits of illicit methods.

Accordingly, I think Haley's confession should have been excluded and the conviction based upon it should not stand.

*a statement is not voluntary which results from*

# SUPREME COURT OF THE UNITED STATES

No. 51.—OCTOBER TERM, 1947.

John Harvey Haley, Petitioner, | On Writ of Certiorari to  
v. | the Supreme Court of  
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[January 12, 1948.]

MR. JUSTICE BURTON, with whom THE CHIEF JUSTICE,  
MR. JUSTICE REED and MR. JUSTICE JACKSON concur,  
dissenting.

The issue here is a narrow one of fact turning largely upon the credibility of witnesses whose testimony on material points is in direct conflict with that of other witnesses. The judgment rendered today by this Court does not hold that the procedure authorized by the State of Ohio to determine the admissibility of the confession of a person accused of a capital offense violates *per se* the Due Process Clause of the Fourteenth Amendment. It holds merely that the application made of that procedure in this case amounted to a violation of due process under the Fourteenth Amendment in that, on this record, it amounted to a refusal by the trial court to exclude from the jury this particular confession which this Court is convinced was an involuntary confession.

The following facts are not disputed:

About midnight, on October 14, 1945, a storekeeper in Canton, Ohio, was shot to death in his store by one of two boys, Alfred Parks, aged 16, or Willie Lowder, aged 17. The accused, John Harvey Haley, then about 15 years and 8 months old and a senior in high school, was with these boys before they went into the store and was waiting for them outside of it at the time when the shooting occurred. Haley testified "all of a sudden I heard a shot and a man hollered, and I was scared and I ran." The two other boys also ran away immediately.

after the shot was fired. The three soon met and Haley then went home. These boys had been together all that evening. Early in the evening, while Parks and Lowder waited outside of Haley's home, Haley went in to get a pistol for their joint use. Without the knowledge of William Mack, the owner of the pistol, Haley took from a trunk a .32 caliber automatic pistol which Haley had shot once on New Year's Day and, from another place in his home, a handful of ammunition for the pistol. The three boys took part in loading it. Haley then turned it over to Parks and Lowder, one or the other of whom thereafter retained possession of it throughout the evening. A day or two after the shooting, Haley asked the two boys what they had done with the gun. He testified that in answer "They said they got rid of it." This much of the story Haley testified to at the trial and has admitted substantially ever since his arrest and since abandoning his first, and admittedly false, statement that he and his two friends had gone to a show that evening. A .32 caliber automatic Colt pistol, the admission of which in evidence is not here in issue, was sent by the Canton police to the Federal Bureau of Investigation for identification, together with the bullet which killed the storekeeper and a cartridge shell found by the police at the scene of the crime. An uncontradicted expert witness from the F. B. I. fired three bullets from the pistol, compared the microscopic markings on them with those on the bullet which had killed the storekeeper and, on this basis, positively identified the pistol as the weapon which had fired the fatal shot. This fatal shot admittedly was fired while Parks and Lowder were in the store of the deceased and were in possession of the pistol with which Haley had supplied them. There is nothing in the record to suggest the presence in the store of any other pistol. Haley testified that this pistol "looked like" the one he had given to his companions.

After hearing the foregoing and other material evidence, including the disputed confession of Haley, the jury found him guilty of murder in the first degree while attempting to perpetrate robbery. The verdict carried a recommendation of mercy which automatically reduced the statutory penalty from death to life imprisonment. In considering the record as a whole, and particularly in reaching a conclusion of fact that the police officers who examined Haley coerced him into making his confession, it is appropriate to note that the foregoing undisputed facts left comparatively little need for such a confession as was signed by Haley. That confession, in substance, added only the express statement by Haley that he knew that Parks and Lowder went into the store to rob the storekeeper and that Haley remained outside to serve as a lookout and to warn Parks and Lowder by tapping on the window in case anyone approached.

The procedure followed by the police as soon as they had the information upon which they arrested Haley was substantially as follows:

On Friday, October 19, 1945, again at about midnight, and while Haley was still up and about his home, after having returned from an evening football game, he was arrested by four policemen who came to his home in two cars. They were admitted to Haley's home by his mother and they took him with them to police headquarters, not using handcuffs. He was "booked" there at about 12:30 a. m. From then until between 3 and 4 a. m. he was in the record room of the detective bureau, usually with two officers. What took place there leading up to his oral, and later signed, confession is the subject of directly contradictory testimony given by the accused and the police. Haley testified that he was roughly handled in such a manner that if this testimony is believed the confession was not voluntary. On the other hand, the police and everyone else who was present or saw

Haley during or after this examination testified in detail, and with positiveness, that Haley was not abused or roughly handled in any degree and that his person and clothes presented a normal appearance after the examination. Immediately after Haley had been shown alleged confessions by Parks and Lowder and had read at least that by Parks, Haley made an oral statement evidently similar to that made by Parks. Thereupon, Haley was taken to a front room where a sergeant of detectives typed Haley's confession in question and answer form during a period which consumed from one hour to an hour and a half. Before taking this confession the sergeant testified that he typed and read to Haley, clearly and distinctly, the preliminary statement, a part of which is quoted in this Court's opinion as being at the beginning of the written confession. The sergeant testified that Haley, after hearing this introduction, said that he still desired to make a statement and tell the truth. When completed, the statement, so prepared, was signed by Haley in the presence not only of some of the police officers who had questioned him but also of two civilian witnesses called in for that purpose from outside of police headquarters. The Acting Chief of Police, who himself was a member of the Bar of Ohio, requested Haley to read the entire confession. When this had been done, the Acting Chief of Police, in the capacity of a notary public, administered the oath signed by Haley at the end of the confession, stating that the facts contained therein were true and correct as Haley verily believed. A newspaper photographer then took a picture of Haley in company with Parks and Lowder. Either then or on the following Monday, the date being disputed, Haley was taken back to his home where the police found the trunk described by him as that from which he had taken the pistol. After his confession he was placed in the city jail and, on the following Tuesday, October 23, he was removed to the county

jail. On that day, a complaint was filed in the Court of Common Pleas of Stark County, Ohio, Division of Domestic Relations, Juvenile Department, by a sergeant of police, charging Haley with being a delinquent child.

On October 29, 1945, pursuant to a motion of the prosecuting attorney, the judge assigned to the above-mentioned Domestic Relations Division of the Court of Common Pleas appointed a doctor to make a physical and mental examination of the accused.

On November 1, 1945, the mental and physical examination was filed and, after hearing, the court found—

"that the said child has committed an act which, if [it] had been committed by an adult, would be a felony; an examination having been made of the said John Haley by a competent physician, qualified to make such examination, it is ordered that the said John Haley shall personally be and appear before the Court of Common Pleas on the first day of the next term thereof to answer for such act."

On November 14, 1945, a transcript from the docket of the above-mentioned Juvenile Court was filed in the Court of Common Pleas. Thereafter, beginning with an indictment for first degree murder which was returned on January 8, 1946, the case proceeded to arraignment on January 11, and to trial in the Court of Common Pleas March 25—April 3, when a verdict of guilty as charged was returned, with a recommendation of mercy. A motion for a new trial was overruled and the case was appealed to the Court of Appeals for Stark County, Ohio, and there was unanimously affirmed October 25, 1946. Appeal was made, both on a motion for leave to appeal and as a matter of right, to the Supreme Court of Ohio. The motion for leave to appeal was overruled and the appeal, as a matter of right, was dismissed by unanimous action of the five judges sitting in the case. The reason

given for dismissal was that the court found that no debatable constitutional question was involved in the case.<sup>1</sup>

Beginning with the arraignment of the accused, the record shows that Haley has been represented by counsel. The case has proceeded in this Court *in forma pauperis*, the accused being represented by the same competent counsel who represented him in the state courts. It does not appear that the accused ever asked to have counsel appointed for him. It does not appear that, at any time before his arraignment, he employed counsel or asked for counsel to represent him. The nearest approach to such action is that disclosed by the testimony of Haley's mother and by a stipulation between the parties that Leroy Contie, an attorney, on Monday, October 22, was employed by Mrs. Haley to represent her son. Mr. Contie went to the city jail on two occasions *after* Haley's confession was signed, was unable to see him and was refused admission by the police authorities. Mr. Contie did not see Haley until after the latter had been transferred to the county jail, some days after that. He apparently did not become an attorney of record in the case.

It is not disputed on Haley's behalf that his arrest and uncoercive questioning after his arrest would have been

<sup>1</sup> It appears from the opinion of the Court of Appeals for Stark County in this case that the three boys were separately indicted and tried. Lowder and Haley were tried by juries. Parks waived that right and was tried before three judges. Each was convicted of murder in the first degree, with a recommendation of mercy. Appeals from the three cases were heard together and the judgments were affirmed in each with a single opinion emphasizing the separate consideration that had been given to each. *Ohio v. Lowder*, *Ohio v. Haley*, *Ohio v. Parks*, 79 Ohio App. 237, 34 O. O. 568, 72 N. E. 2d 785. See also, *Ohio v. Haley*, 147 Ohio St. 340, 70 N. E. 2d 905; *Ohio v. Lowder*, 147 Ohio St. 530, 72 N. E. 2d 102; *Ohio v. Parks*, 147 Ohio St. 531, 72 N. E. 2d 81; where each appeal was dismissed for lack of a debatable constitutional question.

proper under such circumstances. While the constitutional and statutory rights of the accused, under such circumstances, must be safeguarded carefully, it is equally clear that serious constitutional and statutory obligations rest upon law enforcement officers to discover promptly those guilty of such an unprovoked murder as had been committed. Likewise, the comparative youth of these three boys who now have been convicted of this murder is entitled to full recognition in considering the constitutionality of the process of law that has been applied to them. This has been done. Haley's youth was recognized expressly by the preliminary proceedings before the Juvenile Department of the Division of Domestic Relations of the local court. Those proceedings markedly differentiated the procedure from that ordinarily followed in the case of an adult. Undoubtedly the thought of Haley's youth was reflected in the jury's recommendation of mercy, and in the care which the sergeant and the Acting Chief of Police testified that they took in preparing his confession for signature and in seeing to it that Haley understood it and his rights in connection with it. It is necessary to recognize, on the other hand, that the offense here charged was not an ordinary juvenile offense. It was a capital offense of the most serious kind. It involved the same fatal consequence to a law-abiding citizen of Canton as would have been the case if it had been committed by adult offenders. An obligation rests upon the police not only to discover the perpetrators of such a crime but also to determine, as promptly as possible, their guilt or innocence to a degree sufficient to justify their prosecution or release. It is common knowledge that many felonies are being committed currently by minors and an obligation attaches to law enforcement officials to punish, prevent and discourage such conduct by minors as well as by adults. If Haley's part in this

crime had been reasonably suspected by the police immediately after its commission at midnight, October 14, the police would have deserved severe criticism if they had not arrested and questioned him that night. The same obligation rested on them, five days later, at midnight, October 19.

As admitted by the petitioner in this Court, the entire issue here resolves itself into a consideration of the methods used in obtaining the confession. This in turn resolves itself primarily into a question of the credibility of witnesses as a means of determining the contested question as to what methods in fact were used. A voluntary confession not only is valid but it is the usual, best and generally fairest kind of evidence. Often it is the only direct evidence obtainable as to the state of mind of the accused. The giving of such a confession promptly is to be encouraged in the interest of all concerned. The police are justified and under obligation to seek such confessions. At the same time, it is a primary part of their obligation to see to it that coercion, including intimidation, is not used to secure a confession. It should be evident to them not only that involuntary confessions are worthless as evidence, but that coercion applied in securing them itself constitutes a serious violation of duty.

The question in this case is the simple one—was the confession in fact voluntary? As in many other cases it is difficult, because of conflicting testimony, to determine this controlling fact. It may not be possible to become absolutely certain of it. Self-serving perjury, however, must not be the pass-key to a mandatory exclusion of the confession from use as evidence. It is for the trial judge and the jury, under the safeguards of constitutional due process of criminal law, to apply even-handed justice to the determination of the factual issues. To do this, they need every available lawful aid

to help them test the credibility of the conflicting testimony.

Due process of law under the Fourteenth Amendment requires that the states use some fair means to determine the voluntary character of a confession like that in this case. The procedure may differ in each state. The form adopted by Ohio is not criticized by this Court. The sole question here is the validity of the application of the Ohio procedure to the facts of this case. That application can be tested in this Court only under the great handicap of attempting to appraise, by use of the printed record, the action of the trial court and jury taken in the light of the living record. In connection with every confession that is unaccompanied by testimony as to how it was secured, all sorts of conditions may be conjectured as to the methods used to secure it. To rely upon conjecture, either in favor of or against the accused, is not justice. It is not due process of law by any definition. Similarly, all sorts of conditions as to the methods which might have been used in obtaining such a confession may be conjectured by a witness and falsely testified to by him. Such action puts the true testimony into direct conflict with the false. In the present case, the conflict of testimony is so clear that it is evident that one or more of the witnesses must have committed perjury. The issue resolves itself, therefore, not into one of civil rights but into one of the truth or falsity of the testimony as to the methods used in obtaining Haley's confession. This issue of credibility cannot be resolved here with nearly as good a chance of determining the truth as that which was enjoyed by the trial court and jury. They saw and heard the witnesses and they examined the exhibits. Furthermore, they and the State Appellate and Supreme Courts also were familiar with the general conditions and standards of law enforcement in effect in the

long-established industrial civic center of over 100,000 people of Canton, Ohio, where this confession was made and used. The testimony of the witnesses as to the methods used should be read in the context of the community where such testimony was given in order for it to be fairly appraised. There is no suggestion that racial discrimination or prejudice existed in the attitude of any of the witnesses, or of the courts or of the community of Canton. The issue is the credibility of these particular police officers and other local witnesses. It cannot be determined on the basis of published reports, however authentic, of police methods in other communities in other years. "The mere fact that a confession was made while in the custody of the police does not render it inadmissible." *McNabb v. United States*, 318 U. S. 332, 346.

The present case, turning as it does upon the credibility of the testimony as to the existence of the coercion, if any, that was used to secure the confession, is readily distinguishable from cases relied upon by the accused. For example, in the present case, this Court does not rely on any claim that the confession was elicited by unreasonably delaying the arraignment of the accused or even by any alleged delay in charging him with delinquency in the Juvenile Court. The confession of the accused was given, transcribed and signed by 5:30 a. m. on October 20, immediately following his arrest at about midnight. There is, accordingly, no basis for contending that there was unnecessary delay in taking the accused before a court or magistrate having jurisdiction of the offense insofar as such unnecessary delay, if any, had relation to the confession. Whatever delay there was occurred after the confession was made and it is obvious that it was not unreasonable to delay the taking of the accused before a court or magistrate at least until after 5:30 a. m. *United States v. Mitchell*, 322 U. S.

65. Cf. *Anderson v. United States*, 318 U. S. 350; *McNabb v. United States*, 318 U. S. 332.

If the unequivocal and consistent testimony of the several police officers is believed, including that of the Acting Chief of Police, the confession was clearly voluntary. The police officers were men of experience in the local detective service and, if inferences are to be indulged in, it may be inferred that they understood the necessity that the confession be uncoerced and voluntary if it was to be admissible in evidence. The principal examining officers were two detectives, one of nine and the other of eleven years' police service. The sergeant of detectives who typed the confession was a man of nine years' police service. Every policeman who took any part in the examination was called as a witness. Each testified that there was no use of force and no intimidation during the examination. Each testified that in fact the confession was uncoerced. The questioning of the accused was described as having been carried on while the parties to it were seated near a desk and not within arm's length of each other. It was conducted in the record room of the detective bureau, rather than in jail. The accused was not handcuffed nor subjected to indignities. The police, the newspaper reporter, and the iceman who was brought in to witness the accused's signature to the confession testified to the normal appearance of the clothing and person of the accused during or following the examination, including the time he was photographed. The witnesses testified only as to what they severally had observed during the respective periods that they were present but, together, they covered the entire period of the examination. If the confession was in fact voluntary, these witnesses could not have said more to prove it. If their testimony is true, it makes false much of the testimony of the accused. The testing of the credibility of this testimony is therefore important. This testimony, fur-

thermore, should not be laid aside here merely, because it is in conflict with opposing testimony. If the trial court and jury believed the police and disbelieved the accused on this testimony, there was no substantial ground left for any inference of coercion. If, on the contrary, they believed the accused and therefore concluded that the police and other witnesses agreeing with them were perjurers, the trial court could not fairly have admitted the confession in evidence.

The evidence in the record includes ample evidence to support the action taken by the trial judge and jury against the accused if this Court chooses to believe that evidence and to disbelieve the conflicting evidence. Furthermore, that evidence, if so believed, is strong and specific enough greatly to offset conflicting inferences which otherwise might be suggested to this Court by the undisputed evidence.

As a reviewing court, we have a major obligation to guard against reading into the printed record purely conjectural concepts. To conjecture from the printed record of this case that the accused, because of his known proximity to the scene of the crime and his known association that night with the boys, one of whom did the actual shooting, must have been a hardened, smart boy, whose conduct and falsehoods necessarily made all of his testimony worthless *per se*, is as unjustifiable as it would be to assume, without seeing him or his mother as witnesses, that he was an impressionable, innocent lad, likely to be panic-stricken by police surroundings and that all his testimony must be accepted as true except where expressly admitted by him to have been false. To assume from the printed record that the policemen, including the Acting Chief, and the civilians who gave unequivocal testimony as to the absence of force and intimidation in securing the confession or as to the normal appearance of the accused and of his clothing at the time

of making the confession, were callous as to the feelings of a boy 15 years of age or were guilty of deliberate perjury would be as unjustifiable as it would be to assume, without hearing and seeing the respective police officers, as witnesses, that each of them was as well-informed, tolerant and thoughtful as an ideal juvenile judge. In this case, this Court seems to have laid aside all the conflicting testimony and then, without seeing or hearing the witnesses, has attempted to draw, from the meager balance of the record, important inferences of callousness and coercion on the part of the examining officers. By disregarding the conflicting material testimony instead of choosing between the true and the false material testimony, the material record is reduced largely to isolated items of subsequent conduct on the part of certain police officers who are alleged to have hampered the boy's mother or an attorney in trying to see him several days after his confession. There is no likelihood that these officers were the same ones who conducted the examination.<sup>2</sup> It is not enough for this Court to say in its opinion today

<sup>2</sup>In a case which arose in the District of Columbia, this Court said:

"But the circumstances of legality attending the making of these statements are nullified, it is suggested, by what followed. For not until eight days after the statements were made was Mitchell arraigned before a committing magistrate. Undoubtedly his detention during this period was illegal. . . . Illegality is illegality, and officers of the law should deem themselves special guardians of the law. But in any event, the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be used by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct." *United States v. Mitchell*, 322 U.S. 65, 70-71.

that if "the undisputed evidence suggests that force or coercion was used to exact the confession, we will not permit the judgment of conviction to stand . . . . Recognition must be given also to the right of the trial court to weigh the credibility of the material disputed evidence.

We are not in a position, on the basis of mere suspicion, to hold the trial court in error and to conclude "that this was a confession wrung from a child by means which the law should not sanction." While coercion and intimidation in securing a confession should be unequivocally condemned and punished and their product invalidated, nevertheless such coercion should not be presumed to exist because of a mere suggestion or suspicion, in the face of contrary findings by the triers of fact. On the basis of the undisputed testimony relied upon by this Court, it is not justified in making such a determination of "the callous attitude of the police" of Canton as thereby to override not only the sworn testimony of the State's public officials but also the conclusions of the triers of fact. The trial judge, with his first-hand knowledge, both of the credibility indicated by the testimony in open court and of the habitual "attitude of the police" of Canton, if there be any such attitude, found to the contrary. That judge and the law enforcement officers of Canton have been entrusted by the State of Ohio with the enforcement of the constitutional obligations of the public to each individual and also of each individual to the public. In the absence of substantial proof to upset the findings of the trial court, these public officers should not be charged with callousness toward, or with violation of, their constitutional obligations.

The legal process governing the admission of confessions in evidence in jury trials in Ohio in a case like this takes these conditions into consideration. The Ohio procedure provides for a preliminary examination by the trial judge, out of the presence of the jury, to determine

whether the confession should be excluded as involuntary. Such an examination was made at length in this case and the judge, in the absence of the jury, overruled the objection made to the confession upon such ground. The motion was renewed in the presence of the jury and again denied. The judge likewise refused to direct a verdict for Haley at the close of the State's case and again at the close of the entire case. The admissibility of the confession was fully argued in the trial court and, before its admission, the trial judge took the subject under advisement while he adjourned the hearing over a weekend. Having decided that the confession was not to be excluded, it was his duty to submit it to the jury. He did this with ample instructions advising the jury of its responsibility in connection with the confession. Testimony then was given at length, in the presence of the jury, bearing upon the voluntariness of the confession as well as upon the probable truth or falsity of its contents. The final instructions of the court emphasized not only the obligation and opportunity of the jury to pass upon the voluntariness of the confession but also its obligation to give appropriate weight to the confession in the light of all the testimony in the event that the confession was found by the jury to have been a voluntary one.<sup>3</sup>

<sup>3</sup> The trial court included in its final instructions to the jury the following:

"You will recall that I have heretofore said to you that, in general, the judge determines the admissibility of evidence. But, you will recall I think that on Monday just before certain alleged statements or declarations claimed by the State to have been made by the defendant, in part oral and in part consisting of an alleged written or typed statement or declaration, identified as State's Exhibit D, were by the judge permitted to be introduced with the instruction that you the jury would in the end and finally, determine first, whether the defendant made said statements and declarations, and if he did make it, whether they were made by the defendant voluntarily and of his own free will; and further in the event you should find he did make

The rule of law governing this case is stated in *Lisenba v. California*, 314 U.S. 219, 238:

"There are cases, such as this one, where the evidence as to the methods employed to obtain a confession and made them voluntarily and of his free will, just what weight, if any, should be accorded them."

"I now again direct your attention to that evidence. The State claims the defendant made said statements and declarations and that he made them voluntarily and of his own free will. The defendant denies the State's said claims and asserts they were not made voluntarily and of free will. You will decide these questions from all the evidence in the case. Should you find from all the evidence that the defendant did not make them, or if he made them that he did not make them voluntarily and of his free will, you will in that event disregard them entirely and not consider them further. On the other hand, should you find defendant did make them and that he made them voluntarily and of his own free will, you will consider them as evidence and give them just such weight to which you find from all the evidence they are entitled. Should you find from the evidence that some of them were made by the defendant and by him made voluntarily and of his free will, and find others were not made by him, or if made by him, not made by him voluntarily and of his free will, you will consider only those you find were made by him voluntarily and of his free will and reject the others. You will consider the alleged oral statements or declarations, separate and apart from the said written or typed statements, and the circumstances incident to each."

"You are instructed further that statements of guilt or declarations of guilt as they are sometimes called, made through the influence of hopes or fears, statements or declarations induced by promises of temporal benefit or threats of disadvantage, are to be weighed and not to be considered of any value. Statements and declarations which are not voluntary and of free will made, are excluded on the ground that they are probably not true. Another ground for the exclusion is that it is a violation of the constitutional provision that no man shall be required to give evidence against himself, for if he is compelled by threats or induced by hopes to make confession against himself, it is an indirect method of compelling him to give evidence against himself, when statements or declarations made under such circumstances are afterwards proven against him in court. On the

fession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury, which involves an answer to the due process question. In such a case, *we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.*" (Italics supplied.)

This Court properly reserves to itself an opportunity to consider the record in a case like this independently from the consideration given to that record by the lower courts. However, when credibility plays as large a part in the record as it does in this case, this Court rarely can justify a reversal of the judgment of the trial court and the verdict of the jury. This is increasingly true where the judgment of the trial court has been affirmed, as here, by two State courts of review. In the preliminary examination as to the admissibility of the confession in this case, the trial court may have believed the police and disbelieved the accused. On that basis, there is more than ample evidence to support the trial court's conclusion in refusing to exclude the confession. A similar statement may be made as to the presentation of evidence to the jury. It is not justifiable for this Court, in testing the conclusions of the triers of fact, to rely on inferences drawn solely from those portions of the record which,

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other hand, a free will and voluntary statement or admission, made by a defendant against his interest, *against his interest*, is one of the most satisfactory proofs of guilt, for an innocent person will not voluntarily subject himself to infamy and liability to punishment by false statements against himself.

"The State having offered these statements or admissions, must prove that they were made; but the burden of proving that a particular statement or admission was obtained by improper inducements, in general, is upon the defendant."

when read separately, apparently were not disputed. The acceptance of one version or the other of the sharply conflicting testimony which was before the triers of fact could reasonably justify a conclusion of the trial court and jury to exclude or admit the confession without reference to, or even in spite of, implications which might be drawn from the comparatively colorless undisputed testimony if that undisputed testimony stood alone. This Court should include in its appraisal of the record not only the undisputed testimony, but it also should allow for a reasonable conclusion by the trial court and jury, based upon acceptance or rejection of the disputed testimony. On this basis, this Court is not justified, in this case, in holding that the determination by the trial judge that the confession was admissible, or that the holding by the trial jury that the confessor was guilty, "is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process."<sup>4</sup>

In testing due process this Court must first make sure of its facts. Until a better way is found for testing credibility than by the examination of witnesses in open court, we must give trial courts and juries that wide discretion in this field to which a living record, as distinguished from a printed record, logically entitles them. In this living record there are many guideposts to the truth which are not in the printed record. Without seeing them ourselves, we will do well to give heed to those who have seen them.

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<sup>4</sup> See *Lisenba v. United States, supra*, p. 238.